IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 37

HEWITT-ROBINS INCORPORATED,

Petitioner,

—v.—

EASTERN FREIGHT-WAYS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

HARRY TEICHNER,
66 Court Street,
Brooklyn 1, New York,
Attorney for Petitioner.

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Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 20) is reported in 187 F. Supp. 722.

The majority opinion of the Court of Appeals (R. 23) and the dissenting opinion of Judge Moore (R. 27) are reported in 293 F. 2d 205.

Jurisdiction

The judgment of the Court of Appeals was entered on July 25, 1961 (R. 32). The petition for a writ of certiorari

was filed on October 11, 1961 and granted on January 8, 1962 (R. 33). 368 U. S. 951. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Statute Involved

The chief statute involved is the Motor Carrier Act §§291, *et seq.*, Part II of the Interstate Commerce Act, 49 U. S. C. §§301-327, the pertinent portion of which is Section 216 (j) of the Motor Carrier Act [49 U. S. C. §316 (j)] providing as follows:

> "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

Question Presented

Whether the common law action for damages sustained by a shipper by reason of motor carrier misrouting of a shipment of goods has survived the enactment of the Motor Carrier Act §§291, *et seq.*, Part II of the Interstate Commerce Act, 49 U. S. C. §§301-327.

Statement

This is an action by petitioner, a shipper of goods, against respondent, a common carrier by motor vehicle, to recover damages sustained by petitioner by reason of respondent's misrouting of numerous shipments of the petitioner.

Between January 1, 1953 and February 1, 1955, the petitioner delivered numerous shipments of foam rubber pads to the respondent, a common carrier by motor vehicle, for transportation from Buffalo, N. Y., to New York City, N. Y. The respondent possessed operating rights over an interstate route between those points, as well as an intrastate route. The applicable rates for the interstate movement, as published in tariffs on file with the Interstate Commerce Commission,

were higher than the applicable rates for the intrastate movement, as published in tariffs on file with the Public Service Commission of New York. These shipments were tendered unrouted by the petitioner.

In the first count of the complaint herein (R. 1) the petitioner alleges that the respondent transported said shipments over its higher-rated interstate route, and that by reason thereof the respondent charged and collected from the petitioner the sum of $10,000.00 in excess of the charges that would have accrued if the respondent had moved the shipments over the less expensive intrastate route. The petitioner demands judgment in that amount.

The first count of the complaint (R. 1) alleges the conclusion of law that the respondent's conduct was an unreasonable practice in violation of the Interstate Commerce Act. It is also requested therein that the proceedings in this action be held in abeyance pending the filing of a complaint by the petitioner with the Interstate Commerce Commission for an order "determining the reasonable and just rates for the transportation of the aforesaid shipments."

Proceedings thereafter instituted by petitioner before the Interstate Commerce Commission resulted in a report made by the Commission, in which a finding was made that the lower-rated route should have been used by respondent in transporting said shipments. The Commission also found that the practice of respondent in using its higher-rated interstate route was an unreasonable practice. The report is published in *Hewitt-Robins Incorporated* v. *Eastern Freight Ways, Inc.*, 302 I. C. C. Reports 173 (1957).

Respondent, being dissatisfied with the Commission's decision, commenced an action against the United States of America and the Interstate Commerce Commission in the United States District Court for the District of New Jersey, to set aside the report and order of the Commission made in said proceedings. Petitioner was not made a party to that

action. The case was tried before Judge Richard Hartshorne in the United States District Court for the District of New Jersey, but no decision has been made therein, and such decision is being held in abeyance pending the determination of the instant appeal.

Subsequent to the commencement of this action and after the trial of the New Jersey action, the Supreme Court of the United States handed down the decision reported as *T. I. M. E. Inc. v. United States of America*, 359 U. S. 464 (1959). Respondent urged in the Courts below that this decision requires a dismissal of the complaint herein. District Judge Alexander Bicks in an opinion (R. 20), reported in 187 F. Supp. 722, agreed with respondent's contention, held that the savings clause of the Interstate Commerce Act, 49 U. S. C. §316(j) did not preserve the common law remedy of a shipper against a motor carrier to recover damages for misrouting, and made an order dismissing the complaint (R. 22) on the ground that no justiciable issue is presented upon which any relief may be granted to petitioner.

Upon appeal from the District Court's dismissal of the complaint, the Court of Appeals affirmed (R. 24-32), one Judge dissenting (R. 27-32). The opinions are reported in 293 F. 2d 205.

ARGUMENT

I.

THE COMPLAINT ALLEGES FACTS SHOWING A VIOLATION OF PETITIONER'S COMMON LAW RIGHT TO THE TRANSPORTATION OF ITS GOODS OVER THE CHEAPEST ROUTE.

Under the common law where a carrier maintains different rates on the same traffic over two open routes between the same points, and the freight rate over one route is less than such rate over the other route, if other conditions are reasonably equal, it is the duty of the carrier to transport the shipments between those points over the line which will give the shipper the benefit of the cheaper rate. *Northern Pacific Railway Co. v. Solum*, 247 U. S. 477, 482 (1918).

In *Woolwan Transportation Co. v. George Rutledge Co.*, 162 F. 2d 1016 (3rd Cir. 1947), the motor carrier quoted the shipper an intrastate rate for transporting goods between two points in New Jersey. The carrier, however, moved the goods via its interstate route and demanded payment on the basis of its higher interstate route, contending that it was required by the Interstate Commerce Act to observe its interstate rate by the route of movement. In denying recovery by the carrier the Court of Appeals said:

> "* * * The contract between the parties was for intrastate carriage of the goods by motor truck between Montclair and Fredericktown, * * *. Instead, for its own convenience and because of certain union contracts with its truck drivers, it transported the goods over a longer interstate route, via Wilmington, Delaware. By such unilateral action, however, it could not convert a lawful contract for intrastate carriage into one for interstate carriage so as to impose upon the defendant shipper liability for a rate higher than it had agreed to pay."

It seems clear that a delivery of a shipment to a carrier and acceptance by it without routing instructions, has the effect of writing into the contract of carriage a covenant to the effect that the carrier shall select the cheapest available route, all conditions being equal. Neither the Motor Carrier Act nor its legislative history evinces any intent to give the right to motor carriers to abrogate their contract obligations and increase their charges for transportation by resorting to the device of misrouting shipments.

In *S. W. Shattuck Chemical Co.* v. *T. & M. Transp. Co.*, 134 F. 2d 394, (10th Cir. 1943), it was held that in an action by an interstate motor carrier to recover under-charges of freight by reason of shipment over a route selected by the carrier, it was error to strike the shipper's answer and cross-petition alleging that there were other available routes over which rates did not exceed the amount paid and one of such routes should have been used.

In a subsequent appeal after a trial in that case, reported in *T. & M. Transp. Co.* v. *S. W. Shattuck Chemical Co.*, 148 F. 2d 777 (1945), the Circuit Court of Appeals, Tenth Circuit, stated that if an interstate motor carrier promises to select the cheapest available rate and route and to ship merchandise accordingly, and fails to do so, it is liable to the shipper in damages for the difference between the rate charged and the cheapest applicable and available rate, citing *Northern Pacific R.* v. *Solum*, 247 U. S. 477; *Western Grain Co.* v. *St. Louis-San Francisco R. Co.*, 5 Cir., 56 F. 2d 160; *Galveston, H. & S. A. R. Co.* v. *Lykes Bros.*, D. C., 294 F. 968; *St. Louis Southwestern R.* v. *Lewellen Bros.*, 5 Cir., 192 F. 540; *Roberts Federal Liabilities of Carriers*, Second Edition, Sec. 332, p. 659.

The Courts below and the respondent herein emphasize the fact that the complaint contains an allegation that the cause of action is founded upon the Motor Carrier Act and they conclude, therefore, that no justiciable issue exists for the reason that the Motor Carrier Act has not created a statu-

tory cause of action for damages for misrouting. We respectfully submit that the facts alleged in the complaint, and not the manner in which the cause of action is characterized, establish the proper criteria for determining whether a justiciable issue is presented upon which relief may be granted. Under the factual allegations of the complaint the real cause of action is to recover money unlawfully exacted from the petitioner. The right to recovery asserted by the petitioner is a traditional common law claim.

II.

THE COMMON LAW ACTION FOR DAMAGES SUSTAINED BY A SHIPPER BY REASON OF MOTOR CARRIER MISROUTING OF A SHIPMENT OF GOODS HAS SURVIVED THE ENACTMENT OF THE MOTOR CARRIER ACT.

The Courts below have held that the decision of this Court in the case of *T. I. M. E. Inc.* v. *United States of America*, 359 U. S. 464 (1959), authorizes the conclusion that the Motor Carrier Act has destroyed the common law action for damages sustained by a shipper as a result of motor carrier misrouting and has left him without any remedy against such unlawful conduct. Needless to say, such harsh result can bring about shocking consequences in the area of national motor transportation. In remarks by General Counsel of the Interstate Commerce Commission, expressing the views of the Interstate Commerce Commission, that the decision of this Court in *T. I. M. E. supra*, has no application to the case at bar (R. 16), appears the following:

> "Obviously, once a carrier takes possession of a shipment, the shipper has no way to guard against a carrier misrouting his shipment. It would be contrary to all sense of fair play to hold that a shipper is so at the mercy of a carrier that the latter may collect and retain the rate over whatever route it chooses to

> transport even though it violates its duty to select the cheapest route available to it. Consequently, the courts have recognized the right of shippers to protection from misrouting by the transporting carrier."

In *T. I. M. E. supra*, this Court in stating the issue before it for decision, said at page 465:

> "These cases present in common a single question under the Motor Carrier Act: Can a shipper of goods by a certificated motor carrier challenge in postshipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?"

This question was answered in the negative in a 5 to 4 decision, the Court holding, in substance, that a shipper does not have a justiciable legal right to recover past motor carrier charges to the extent that such charges were *intrinsically* unreasonable. There was no question of misrouting. No claim is being made in the case at bar that the rates charged by the respondent carrier are unreasonable *per se*. The real claim is that the carrier subjected the petitioner herein to wrongful charges by transporting its shipments over more expensive interstate routes contrary to respondent's duty, as a common carrier, to transport the unrouted shipments over the less expensive intrastate routes, in the absence of adequate justification for failure to do so.

Although the respondent carrier's practice in transporting the shipments over the higher-rated route may be characterized as an "unreasonable" one, nevertheless, it is not necessary to label it in such manner in order to state a cause of action. The allegations in the first count of the complaint (R. 1), employing the words "reasonable" and "unreasonable", are conclusory and mere surplusage and cannot have the effect of casting this simple misrouting action into the class of actions involving intrinsic unreasonableness of rates, proscribed by

T. I. M. E. supra. Although misrouting has been classified as an unreasonable practice, nevertheless, misrouting claims involve the payment of legal and supposedly reasonable charges resulting from the use of a higher rated route than an equally available lower rated route, each rate being the legal rate for its particular route, not whether either rate is unreasonable for application over its particular route. This difference, it is respectfully submitted, prevents the *T. I. M. E.* case from being applicable to claims for misrouting.

In this connection, it is interesting to note that the Courts below have grasped upon the word "unreasonable", which is used in the complaint, and have concluded in effect that because the same word is employed in *T. I. M. E.*, that case must necessarily be decisive of the case *sub judice*. We respectfully submit that such rationale, which plays upon the words "reasonable" and "unreasonable" and paraphrases the opinion of this Court in *T. I. M. E.*, amounts to no more than an exercise in semantics. In the last analysis we are not dealing here with the reasonableness of rates as was done in *T. I. M. E.*

In the case of *Miller* v. *Davis, Director General of Railroad*, 213 Iowa 1091 (Sup. Ct. Iowa, 1932), a misrouting action, the Court said in part:

> "This is not a case in which the reasonableness of a rate is involved. It is a case in which it is claimed the wrong rate was applied because the goods were shipped by the wrong route, contrary to the rights of the shipper."

In the case of *Galveston, H. & S. A. Ry. Co.* v. *Lykes Bros.*, 294 Fed. 968 (U. S. D. C., S. D., Texas, 1923), the Court recognized the principle that where a shipper gives no routing directions, and the carrier forwards the traffic over one route when another route carrying a lower rate is equally available, the carrier must refund to the shipper the differ-

ence between the higher rate and the rate applying over the less expensive route. The Court said, at page 973:

> "This, then, is not a case of reparation on account of unlawful or unreasonable tariffs."

In *Northern Pacific Ry. Co.* v. *Solum*, *supra*, this Court said at page 482:

> "In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route. But the duty is not an absolute one. The obligation of the carrier is to deal justly with the shipper not to consider only his interests and to disregard wholly, its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only 'if other conditions are reasonably equal'."

This Court held that whether the conditions are reasonably equal presents an administrative question for the Interstate Commerce Commission. If the Commission should determine that the "conditions are reasonably equal," it must be concluded that the carrier violated its obligation to the shipper to ship by the cheaper route, and the shipper is entitled to recover in a court of law the difference between the charges paid and those that would have accrued over the cheaper route.

In the case at bar, the petitioner filed a complaint with the Interstate Commerce Commission seeking an administrative finding as to whether the facts surrounding the movement justified the conduct of the respondent carrier in transporting the considered shipments over the higher rated interstate route, so that such finding would be in aid of the Court in determining whether petitioner is entitled to prevail in this action. Cf. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59 (1956). It is respectfully submitted that the Commission had power to make such finding. While *T. I. M. E.*

deprives the Commission of jurisdiction to determine the intrinsic reasonableness of past motor carrier rates, that case should not be interpreted so as to entirely prohibit the Commission from making findings of any other administrative issues in aid of the courts in litigation pending therein.

In *Riss & Company* v. *Association of American Railroads*, 178 F. Supp. 438 (District of Columbia, 1959), the Court in discussing *T. I. M. E.*, said at page 446:

> "This Court does not hold that *all* common-law remedies heretofore available at common law against motor carriers did not survive the Motor Carrier Act of 1935 * * *."

It is submitted that *T. I. M. E.* does not authorize the abolition of a cause of action for motor carrier misrouting. The factors that persuaded the majority of the Justices in that case to make their decision are not present in a case of misrouting. This rationale is well expressed in the analysis made by Judge Moore in his dissenting opinion, below (R. 27-32). Whereas Congress has provided the shipper with an opportunity to protest the reasonableness of rates filed by motor carriers with the Interstate Commerce Commission before the effective date thereof, no similar protection is afforded a shipper against misrouting by a carrier. See *Common Law Remedy of Recovering Reparations for Unreasonable Routing by Motor Carrier Held Abrogated by Motor Carrier Act*, 62 Columbia Law Review, 521-526 (March 1962) for a criticism of this Court's decision in *T. I. M. E.* and an analysis of whether the *T. I. M. E.* rationale was properly applied to the instant case.

The Motor Carrier Act specifically provides that all remedies not inconsistent with its provisions survive its passage. We fail to perceive in what manner the common law right asserted by the petitioner can be deemed inconsistent with the provisions of the Act. The mere omission of a provision in the Act granting such remedy does not have the effect of

extinguishing it. Nor does the Act destroy the common law remedy merely because an administrative finding may be required to determine whether conditions would make it unreasonable to ship by the cheaper route. Insofar as that issue is concerned there is no obstacle, statutory or otherwise, to the application to the present case of the doctrine of primary jurisdiction as defined and explained in *United States* v. *Western Pacific R. Co., supra,* and *United States* v. *Chesapeake & Ohio Railway Co.,* 352 U. S. 77 (1956). It is respectfully submitted that the petitioner had a right to commence a common law action to recover the damages it sustained by reason of the carrier's misrouting of its shipments, and to have the Court refer the incidental administrative issue to the Interstate Commerce Commission as an aid to the Court in rendering judgment in the case.

In *West Tennessee Motor Express, Inc.* v. *Dyersburg Cotton Products, Inc.,* 298 F. 2d 710 (6th Cir. 1962), the doctrine of primary jurisdiction was applied to a case where a motor carrier brought an action to recover unpaid freight charges and the defendant shipper requested that the issue of applicability of tariffs, as well as construction and definition of terminology in the tariffs, be referred to the Interstate Commerce Commission for determination in aid of the Court. The Court of Appeals held that the shipper's request was proper and, thereupon, the court proceedings were stayed pending the Commission's determination of such administrative issue.

Certainly, equity and good conscience would dictate, that under the circumstances existing in this case, as well as in all misrouting cases, the shipper should have a remedy for the patent wrong committed by the carrier. In the case at bar, the carrier by its own wrongful conduct has become unjustly enriched at the expense of the shipper in the sum of $10,000.00 No carrier should be permitted to take refuge in this Court's decision in the *T. I. M. E.* case in an effort to be immunized against liability for such wrong. If this

Court allows the decision of the Courts below to become the law of the land, some motor carriers may be tempted to prey upon the unprotected shippers by resorting to the technique of misrouting shipments and mulcting the shipping public of millions of dollars a year without fear of civil prosecution. *T. I. M. E.* should be limited to its own facts and should not be extended to deprive shippers of their common law right to recover damages for carrier misrouting. It is respectfully submitted that the instant suit to recover for misrouting is judicially cognizable and that the Courts below were in error in making a contrary determination.

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED AND THE CAUSE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

Respectfully submitted,

Harry Teichner

HARRY TEICHNER,
Attorney for Petitioner.